CF0000061790

(3)

Division Bench (Criminal)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR

CRIMINAL APPEAL NO. 582 OF 1997

(Criminal Appeal under Section 374(2) of the Code of Criminal Procedure)

3369
Filed on 6.3.97
by Shri V. Kashyap
Advocate

APPELLANTS : (IN JAIL)

1) Jitendra Chandel,
Aged about 20 years,
S/o Latiya Satnami,
Resident of Rajendra Nagar
Ward, Jagdalpur, Police
Station Jagdalpur,
District Bastar (MP)

2) Bindesh Chandel,
Aged about 23 years,
S/o Latiya Satnami,
Resident of Rajendra Nagar
Ward, Jagdalpur, Police
Station Jagdalpur,
District Bastar (MP).

VERSUS

RESPONDENT : State of Madhya Pradesh,
Through the Police Station
Bodhghat, Jagdalpur,
District Bastar (MP).

CRIMINAL APPEAL UNDER SECTION 374(2)
OF THE CODE OF CRIMINAL PROCEDURE

XI-HC-22

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

A.C.R. (76)

आदेश पत्रक

मामला क्रमांक Cr.A No. 582/97 सन् 200

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

DIVISION BENCH: -

HON'BLE MR. L.C. BHADOO AND
HON'BLE MR. DHIRENDRA MISHRA, JJ.

2-2-2006

Shri Vishnu Koshta, counsel for the appellants.

Shri U.N.S. Deo, Additional Public Prosecutor with Shri Akhil Mishra, Panel Lawyer for the State/respondent.

Oral judgment dictated on *Dais.*

Per L.C. Bhadoo, J.

The accused/appellants have preferred this appeal under Section 374 (2) of the Cr.P.C. questioning the legality of the judgment of conviction and order of sentence dated 11-12-96 passed by learned Sessions Judge, Jagdalpur in Sessions Trial No.158/95 whereby learned Sessions Judge after holding the accused/appellants guilty for commission of offence under Section 302 read with Section 34 of the I.P.C. for committing murder of Pancham Sirha, sentenced each of the accused/appellants to undergo imprisonment for life.

The case of the prosecution, in brief, is that on 25-3-95 at 16.25 hours PW-1 Gwalin Bai gave a merg intimation Ex.-P/7 in the police station Bodhghat to the effect that today at about 15.15 hours bus driver Ram Narayan came to the house of Pancham Sirha. Accused Jitendra and Bindesh came with a common intention to the house and started saying that 'today driver has come to your house, therefore, he be sent out, we will kill him,' on which Pancham Sirha replied that 'he is my guest, don't kill him'. At that time, accused

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Bindesh caught hold of Pancham Sirha from neck and Jitendra attacked Pancham Sirha on his stomach with a great force with a knife like iron weapon, as a result of which Pancham Sirha fell down. She took him to the Maharani hospital for treatment but the doctor declared him brought dead. Receiving this report, S.H.O. police station registered F.I.R. Ex.-P/4, left for the hospital and prepared Panchanama Ex.-P/1 of the dead body of Pancham Sirha. The investigating officer also took into possession plain soil and blood stained soil from the place of occurrence under Ex.-P/2. The baniyan, shirt and dhoti of deceased Pancham Sirha were taken into possession under Ex.-P/3. Accused Jitendra while in the police custody gave a memorandum Ex.-P/5 under Section 27 of the Evidence Act regarding the place where he had kept iron knife (gupti) (for short 'the knife'). In pursuance of that iron knife (gupti) was taken into possession under Ex.-P/6. The postmortem was conducted by Dr. K.R. Maurya and he prepared the postmortem report Ex.-P/12. The investigating officer sought an opinion Ex.-P/10 from the doctor as to whether from iron knife (gupti), weapon of offence, death can be caused. The doctor gave his opinion Ex.-P/13 that injuries found on the body of deceased Pancham Sirha might be caused by iron knife (gupti) weapon of offence. The length of the blade of knife was 36 cm. in centre and 46 cm. from the outer portion.

After completion of the investigation, charge sheet was filed in the Court of Judicial Magistrate, Jagdalpur who in turn committed the case to the Sessions Court, Jagdalpur where the prosecution examined 6 witnesses to establish the charge against the accused

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persons. Statements of the accused persons were recorded by learned Sessions Judge under Section 313 of the Cr.P.C. in which both the accused persons denied the prosecution evidence and stated that they have been falsely implicated in the crime.

After hearing arguments of Public Prosecutor and counsel for the accused, learned Sessions Judge convicted and sentenced the accused persons as mentioned in para-1 of this judgment.

We have heard learned counsel for the parties.

The homicidal death of deceased Pancham Sirha is not in dispute.

As far as involvement of the accused/appellants in crime in question is concerned, Shri Vishnu Koshta learned counsel for the accused/appellants vehemently argued that as far as accused/appellant No.2 Bindesh is concerned, there is no evidence that he attacked with gupti or he was carrying any type of weapon with him or he had any knowledge that co-accused Jitendra was carrying knife with him, therefore, he was not sharing common intention with accused Jitendra to attack Pancham Sirha with the knife. He further argued that there was only one stab injury, therefore, in any case, offence does not travel beyond Section 304-II of the I.P.C. against the accused/appellants.

On the other hand, Shri U.N.S. Deo, learned Additional Public Prosecutor with Shri Akhil Mishra, learned Panel Lawyer supported the judgment of the trial Court.

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In order to appreciate the argument advanced by respective counsel, we have perused the evidence. PW-1 Smt. Gwalin Bai is the eyewitness who witnessed the crime in question and is the wife of deceased Pancham Sirha. She has categorically stated that on the fateful day at about 3 p.m. one driver came to their house and they asked him to take meal, at that time, accused Jitendra and Bindesh came to their house and asked that the driver be sent out, they would kill him, on which they replied that 'you kill him after he leaves their house, don't kill him just now'. On which accused Bindesh caught hold of Pancham Sirha, her husband, and took him out from the house. Accused Jitendra stabbed Pancham Sirha with the knife and the accused persons fled away. Pancham Sirha fell down. Thereafter, she along with her nephew Gautam took Pancham Sirha to the Maharani Hospital in a rickshaw where the doctor declared him brought dead. She lodged the report Ex.-P/4.

PW-2 Tulsa has stated that on the fateful day at about 3 p.m. one driver came to their house. Her father Pancham Sirha, driver and family members were taking lunch, at that time, accused persons namely, Jitendra and Bindesh came to their house and said that driver be sent out, we would kill him. Accused Bindesh took her father out of the house and Jitendra stabbed with the knife to her father. Both the accused persons fled away. Her mother took her father to the hospital in a rickshaw. PW-4 Gautam has also corroborated the above evidence.

In order to attract the provisions of Section 34 of the I.P.C. regarding common intention as has been held by the Hon'ble Apex

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Court in the matter of **Girija Shankar V. State of U.P.** reported in **2004 AIR SCW 810** that:

> "The element of participation in action has to be established. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under S. 34 if such criminal act is done in furtherance of common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of S.34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true concept of Section 34 is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. The existence of a common intention amongst the participants in a crime is the essential element for application of this Section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision. The Section does not say 'the common intention of all', nor does it say 'and intention common to all'. Under the provisions of S.34 the essence of the liability is to be found in the existence of a common intention animating the

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accused leading to the doing of a criminal act in furtherance of such intention. "

Applying the above principle, if we look into the evidence of PW-1 Smt. Gwalin Bai, PW-2 Tulsa and PW-4 Gautam, who were present at the scene of occurrence, at the time of commission of crime. The evidence of above witnesses shows that both accused persons namely, Jitendra and Bindesh, who are real brothers, came together at the residence of the deceased and asked him to send out the driver who was inside the house as they would kill him. On his refusal, Bindesh took Pancham Sirha out of the house and without waiting for a moment, accused Jitendra stabbed Pancham Sirha with knife on his stomach as a result of which Pancham Sirha died spontaneously.

Coming to the argument of learned counsel for the accused/ appellants that accused Bindesh was not sharing common intention to kill Pancham Sirha and he was having no knowledge about the weapon, which co-accused Jitendra was carrying. It is difficult to accept this argument for the reason that in the first instance size of weapon was such that it is difficult to perceive that an accused accompanying co-accused could not notice the weapon which the co-accused was carrying. As has been mentioned earlier that even the size of central portion of blade of the knife was 36 cm. and length of the knife from the outer portion was 46 cm. Moreover, both were brothers and they came determined to attack Ram Narayan who was at the house of the deceased. When the deceased objected to it, without giving second thought, Bindesh immediately took Pancham Sirha out of the house

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -7-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

and accused Jitendra stabbed him. Therefore, accused Bindesh was sharing common intention with accused Jitendra was writ large as per the above evidence.

Now, coming to the second limb of argument of Shri Vishnu Koshta that the accused persons had not come with the intention to cause death of Pancham Sirha, the intention of the accused persons can be gathered from the weapon used, size of the weapon, place where the assault took place, background facts leading to the assault, and part of the body where the blow was given. In the instant case, admittedly, the accused persons came with a preplan to attack Ram Narayan and they made their intention very clear to Pancham Sirha that the driver be sent out, they would kill him. Moreover, they came with a knife. The size of blade of the knife was 36 cm long from the central point and 46 cm long from the outer portion. Stabbing with such a long knife in the stomach i.e. the vital organ of the body of Pancham Sirha, makes the intention of the accused persons very clear that they attacked the deceased with the intention to kill. As per the evidence of Dr. K.R. Maurya (PW-6) there was stab wound in the centre of the stomach in the size of 1.5 cm x 0.5 cm deep up to the abdominal cavity placed vertically 1 cm below. Perforated wound left lobe of liver inner surface in the size of 0.2 cm x 1.5 cm i.e. wound of entrance, exit wound in the size of 1 cm x 0.5 cm. There was injury on the liver in the size of 0.2 cm x 1.5 cm. and the deceased died instantaneously. Therefore, looking to the fact that the accused persons came with preplan, nature of offence and also the fact that on the vital parts of the body of the deceased where stab

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विरुद्ध

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wound was caused, the intention of the accused persons was writ large to cause death of the deceased. Therefore, we do not find any illegality or infirmity in the finding of the trial Court convicting the accused persons for commission of offence under Section 302 read with Section 34 of the I.P.C..

In the result, the appeal being devoid of merit, is liable to be dismissed and it is hereby dismissed.

Sd/-
L.C. Bhadoo
Judge

Sd/-
Dhirendra Mishra
Judge

Barve